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BRUCE E. BABBITT
ATTORNEY GENERAL

February 11, 1977

Mr. Roger Hodges, Chief
Social Services Bureau
State Department of Economic Security
Post Office Box 6123
Phoenix, Arizona 85005

Re: 77-35 (R76-429)

Dear Mr. Hodges:

This letter is in response to your memorandum to this office dated October 1, 1976, in which you requested our opinion concerning several questions relating to the pre-adoptive placement of children in this State from out-of-state.

You first ask whether an out-of-state international child placing agency, attorney or other person may request, receive or accept compensation for placing a child in Arizona. In answering this question, we shall assume that you refer to compensation paid by Arizona residents. With this in mind, and with the exception of the cost reimbursement fee hereafter described, Arizona law prohibits the receipt of any compensation or thing of value in connection with the placement of a child in Arizona. The prohibition is contained in subsection C of A.R.S. § 8-126 which states:

> No person and no agency, association, corporation, institution, society or other organization, except as provided in subsections A and B, shall request, receive or accept any compensation or thing of value, directly or indirectly, for placing out of a child.

Subsection A of A.R.S. § 8-126, which is referred to in the above-quoted subsection C, provides as follows:

> When an application is filed with the court, an agency or the division for the adoption of a child, the court, the agency or division may require the applicant to pay to the court, the agency or division a fee based upon the cost of

> services rendered but not in excess of amounts established by the state department of economic security. Inability of the adoptive applicant to pay all or any part of such fee shall not be a disqualifying factor in determining whether to place a child with the applicant. The court, the agency or division may defer, waive or reduce the fee when its application would cause any type of hardship to the adoptive parent or be detrimental to the welfare of the adoptive child. Persons receiving a child from an agency or the division for the purpose of adoption may receive compensation for the care, clothing and medical attention of the child.

Subsection B, which is also referred to in the above-quoted subsection C, simply provides that the fees received by the State Department of Economic Security shall be paid into the State general fund.

Reading the two above-quoted provisions together, it is quite clearly this State's policy that no compensation or thing of value of any kind may be received in connection with an adoption by any person or entity aiding the adoption with the exception of "a fee based upon the cost of services rendered;" and, further, that this cost reimbursement fee may not exceed the amount established by the State Department of Economic Security. This policy is intended to discourage any profit motive in the placement of children in Arizona and to protect Arizona residents from paying more than the costs incurred in making such placements. Moreover, we find nothing in the Interstate Compact on the Placement of Children, to which Arizona recently became a party (Laws 1976, Ch. 17, § 1; A.R.S. §§ 8-548 through 8-548.06), which suggests a different conclusion. To the contrary, the Compact requires the sending agency to comply "with the applicable[1] laws of the receiving state governing the placement of children therein." (Compact, Article III(a); A.R.S. § 8-548.)

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1. Given the strong policy of this State against the making of a profit in connection with an adoption, we do not think it legitimate to contend that A.R.S. § 8-126 is not "applicable" to out-of-state persons when the compensation

It bears mention that subsection A of A.R.S. § 8-126 appears to permit only three types of entities to receive the established fee--"the court, the agency or division." The term "court" is defined in paragraph 6 of A.R.S. § 8-101 to mean the juvenile division of the superior court; the term "division" is defined in paragraph 5 of A.R.S. § 8-101 to mean the State Department of Economic Security; and the term "agency" is defined in paragraph 2 of A.R.S. § 8-101 to mean an agency licensed by the State Department of Economic Security to place children for adoption. It thus might be thought, in the first instance, that not only is the amount of any money received in connection with a placement limited to the fee specified by subsection A, but that the recipient of that fee can be none other than the three specified entities. This would rule out all out-of-state persons, including agencies licensed by other states.

But we do not think this construction of the statute proper in light of the adoption by this State of the Inter-State Compact. The Compact's purpose, which is made manifest in Article I (A.R.S. § 8-548), is to facilitate cooperation between states in the interstate placement of children. This purpose would be frustrated if an absolute ban were imposed on payment of the cost reimbursement fee to out-of-state persons who obviously do not fall within the definitions of the three in-state entities; and we thus must infer that the

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Footnote 1 continued

is to be paid by an Arizona resident. Although the State is attempting to regulate what might be characterized, in part, as out-of-state activities, we think the State contacts here (the involvement of the State's juvenile court in the adoption and the payment by this State's residents for adoption services) are sufficient to defeat a challenge based upon the extra-territorial effect. Compare Bigelow v. Virginia, 421 U.S. 809, 822-825 and (dissent) 834-836 (1975), which, although it involved a First Amendment question, may have some application.

Legislature intended the Compact to modify A.R.S. § 8-126. In this connection, the Compact, by defining the term "sending agency" to mean, among other things, "a person, corporation, association, charitable agency or other entity" (Article II, paragraph (b); A.R.S. § 8-548), does not appear to require that the sending person be licensed in the sending state. We therefore think that if the out-of-state person complies with the laws of the state where the person operates (including those laws, if any, which require licenssing), the fee permitted by subsection A of A.R.S . § 8-126 may be paid. In this regard, the State Department of Economic Security should expect that the cost of services incurred by an out-of-state person with respect to the placement of a child in Arizona will be higher than that which would be incurred by an in-state agency, particularly where the child is coming from a foreign country. Accordingly, the fees established by the Department pursuant to A.R.S. § 8-126 should take this into account.

What previously has been said is equally applicable with respect to out-of-state attorneys. Any amounts they charge for other than legal services must be based upon "the cost of services rendered" (that is, the cost they incur in rendering the service), but not in excess of amounts approved by the State Department of Economic Security. Moreover, their charges for legal services are governed by the policy enunciated in subsection D of A.R.S. § 8-126,[2] which precludes them from receiving compensation "for participation in the finding, locating or placing" of a child

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2. Subsection D provides as follows:

> Any attorney licensed to practice in this state may perform legal services in an adoption proceeding if he does not receive any compensation or thing of value, directly or indirectly beyond a reasonable fee, approved by the court, for legal services rendered, which fee shall not include any compensation for participation in the finding, locating or placing a child for adoption or for the finding of adoptive parents.

for adoption. While this subsection appears to apply only to attorneys licensed to practice in Arizona, we think it establishes a strong Arizona policy which is applicable to all Arizona adoptions.[3]

Your last question is whether the Arizona deputy compact administrator (the Director of the State Department of Economic Security, pursuant to designation by the Governor under A.R.S. § 8-548.02) may sign a form entitled "Interstate Compact Application Request to Place Child" (Form ICPC 100A) if the sending agency has requested, received or accepted compensation from the prospective adoptive parents for services provided or for reimbursement of expenses incurred in connection with making the placement. If the amount to be paid is permitted as previously described, the answer is yes. Otherwise, the answer is no. We should add, however, that some inter-country placements may not be governed by the Interstate Compact, in which case Form ICPC 100A has no application. In this regard, we refer you to Secretariat Opinions 10 and 24 issued, respectively, on September 16, 1974, and January 28, 1976, by the Secretariat of the Interstate Compact on the Placement of Children Project, American Public Welfare Association. A copy of each of those opinions is attached.

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3. Since A.R.S. § 8-114 requires an accounting to be filed with the juvenile court by a person who petitions for an adoption, and since that accounting must list "all disbursements of anything of value made or agreed to be made by or on behalf of the petitioner in connection with the adoption," compliance with A.R.S. § 8-126 is readily determinable.

We recognize that in reaching the conclusions set forth in this opinion we have engaged in major interpretations of legislative policy where the policy is less than clear. More definitive answers to the questions addressed in this opinion can, and perhaps should, be sought from the Legislature.

If you have any questions concerning the foregoing, please let us know.

Sincerely yours,

BRUCE E. BABBITT
Attorney General

ALAN S. KAMIN
Assistant Attorney General

ASK:jrs
cc: Mr. John L. Huerta
Dr. Arlyn Larson
Dr. Carol Norris

Interstate Compact on the Placement of Children
Secretariat Opinion 24 -- January 8, 1976

Applicability of the Interstate Compact on the Placement of Children on Intercountry Placements.

State A proposes to bring intercountry placements under the authority of the Interstate Compact on the Placement of Children. The XYZ Agency, an agency engaged in intercountry adoption,is headquartered in State B. The XYZ agency wishes to place children in State A. Both states are party to the Interstate Compact on the Placement of Children. In what instances would XYZ's placements come within the purview of the Compact:

There are limits on the extent to which an interstate compact can regulate intercountry adoptions. These involve rights of immigration into the United States which are determined by federal law rather than by state statute. If a child is admitted to the United States for purposes of adoption, and if the admission is in compliance with the applicable federal laws, a state cannot keep the child out. Moreover, it would be inconsistent with the purpose of the admission to deny the placement which formed the basis of the permission to enter given by the federal authorities. However, customary procedures in these situations, appear to reduce the likelihood of conflict on this score. So long as the Immigration Authorities require clearance with the state into which the child is intended to go, State A or any other state is in a position to have notice of the placement and to ascertain whether there is any reason to believe it would not be in the best interests of the child.

Even if intercountry adoptions were required strictly to follow the compact procedures from the very beginning, the results would not be onerous. Processing under the compact is to be completed in a maximum of thirty days. Accordingly, if notices of proposed intercountry placements were sent to the receiving state when the intercountry processing begins, the interstate compact procedures would be completed without prolonging or substantially adding to the preplacement time needed for the making of necessary arrangements.

In fact State A asked only that compact procedures be completed after the child has arrived in its new home. The reasons for doing this are both appropriate and salutary. No matter where a child in placement comes from, it is important that the receiving state know of its presence and of the circumstances under which it is in the home. Until the final adoption decree is actually issued and filed, it is always possible that the placement will not succeed and that the intervention of the state welfare authorities to provide services or protection will be necessary. It is also reasonable to seek conditions under which it will be possible to secure unequivocal and prompt implementation of responsibility for the child - an objective that is furthered by notification of the state into which the child is placed.

Intercountry placements are for purposes of adoption rather than foster care. Consequently, the ultimate disposition of and responsibility for the child is not at issue, unless the placement breaks down and the adoption is not consummated. Moreover, in all but subsidized adoption situations, and certainly in intercountry adoption, the prospective adoptive parents assume financial responsibility for the support and care of the child during any pre-adoptive period. Consequently, the sending agency does not have any financial burdens or liability, except in those instances where public policy should look to the sending agency as guarantor.

The advantages are that the whereabouts of the child can be known to all of those who may have to provide services, including the public authorities. Supervision will be assured, either by the licensed agency selected by the sending agency or by the public authorities in the receiving state. Moreover, in those cases where the placement does break down, jurisdictional rights and responsibilities will be clear.

Since covering the intercountry placements into the compact presents no delay in the consummation of the placements, and since it does not enlarge liabilities of the sending agencies beyond what it is admitted they should be, there is every reason to bring them under the compact as State A proposes to do.

Whether these placements must come under the compact depends on several circumstances. The subject needs to be considered first from the point of view of the state in which the sending agency is located and then from that of the receiving state.

State B has enacted the Interstate Compact on the Placement of Children. Article III of the compact prescribes the procedures and the circumstances under which a "sending agency" may cause a child to be brought or sent into "any other party state" (Article III(a)). If the sending agency is within the jurisdiction of State B and if the child is to be brought or sent into a party state other than State B, it can be argued that this language makes the compact applicable.

A sending agency located in one jurisdiction can "cause a child to be sent or brought" from a third jurisdiction into "any other party state", even if it is not physically present there. It is also possible that the sending agency is physically present both in State B and in the third jurisdiction. If the sending agency is organized under the laws of State B, or if some or all of the acts connected with a particular placement are directed from there, it would seem that State B has jurisdiction to regulate the conduct of the agency. The Compact is a law of State B and a commitment to other party states. Consequently, it is sufficient to impose requirements on a sending agency organized or doing business in State B.

Further it is clearly incorrect to say that private agencies are not covered by the Compact. The definition of "sending Agency" in Article II specifically includes persons and private agencies as well as public child welfare agencies and courts.

However, limitations on the applicability of the Compact to intercountry placements do arise from the international character of such transactions. No jurisdictions outside the United States are parties to the Compact and by its terms, only Canadian jurisdictions would be eligible foreign participants (Article IX).

An interstate compact which has not been adhered to by a foreign government is properly considered an instrument of internal law having effect within the United States. While the question of intercountry adoptions, aside from those which might involve Canada, was considered hardly at all when the Compact was drafted, the specific identification of Canadian jurisdictions as the only eligible foreign parties would seem to lead to the conclusion that other intercountry adoptive placements were not meant to be covered. Accordingly, until and unless one or more Canadian jurisdictions enter the Compact, it appears appropriate to read the reference in Article III(a) to "sending or bringing a child into any other party state" to mean "from one party state to another party state."

Nevertheless, there is need to examine each placement situation on the basis of its own facts. If the child is placed directly from abroad into a family home preliminary to an adoption in a party state, and if the home is in the party state, the Compact should not be construed as applicable. However, if the child is brought from abroad to the United States with arrangements for placement not yet entirely completed, or if there is any change in plan once the child has arrived within the United States, the placement should be regarded as internal to the United States, even though the child is of foreign origin. In such circumstances, the placement is one to which the Compact applies.

In the absence of the Compact, State B has an importation statute under which it is unlawful to send or bring a child into the state for placement, except by complying with certain procedures which involve the approval of the state authorities who may require the posting of a bond. With the cooperation of the Federal Immigration Service, it should be possible for State A to enforce this statutory requirement in cases of intercountry placement. It would appear that State B should have some interest in seeing that agencies organized or licensed pursuant to its laws conduct themselves in conformity with the laws of sister American jurisdictions where they do business, although this might be regarded as a matter of comity rather than a compulsory obligation.

Secretariat Opinion 24 -- January 8, 1976
cont.

In the final analysis, however, we wonder why, if the sending agencies in question are really performing as they allege, the proposal of State A to bring the prospective intercountry adoptees retroactively under the Compact should meet any resistance. Denial of an affirmative finding pursuant to Article III(d) is not as a practical matter in issue, since the child will already be in the pre-adoptive home, presumably with the acquiescence of the Immigration Service and clearance with the state already having been obtained. Under such circumstances, objection to the State A proposal would seem to raise questions. One is whether the sending agencies' descriptions of their policies and procedures are accurate. Another is whether the placement methodologies employed by the intercountry adoption agencies are in fact such as to constitute direct foreign - ultimate destination state placement transactions in the overwhelming majority of cases.

Interstate Compact on the Placement of Children
Secretariat Opinion 10 -- September 16, 1974

Foreign-born Children, Interstate Placement.

Do foreign-born children placed from one compact state into another come under the Compact. The answer is yes. Any agency which sends a child from one state to be placed in another is a "sending agency" within the meaning of the Compact. The national origin of the child is immaterial.

It is true that the Compact does not apply to placements made into or out of the United States when the other jurisdiction involved is a foreign country. By its terms, the Compact is open to joinder by Canadian provinces, but only if Congress consents. No such consent has yet been sought.

The inquiry revolves around several international child placing agencies located in compact states. Should such agencies follow the procedures of Article III? Should not correspondence relating to placements to be made by such agencies be directed to the Compact Administrators in the states invovled? And should not such agencies be required to obtain approval from the Compact Administrators? Our understanding of the circumstances described is that the children involved are brought to a Compact state where they are in the charge of a private agency. This agency then finds placements for the children and makes plans for them. Under these circumstances the placement is of children from one compact state into another. Accordingly, regular compact procedures should be followed.